

SUPPORTING STATEMENT FOR NEW AND REVISED INFORMATION COLLECTIONS

OMB CONTROL NUMBER 3038-NEW

Justification

1. Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection. Attach a copy of the appropriate section of each statute and regulation mandating or authorizing the collection of information.

On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act” or “DFA”) went into effect.¹ Title VII of the Dodd-Frank Act amends the Commodity Exchange Act (“CEA”)² to establish a comprehensive new regulatory framework for swaps and security-based swaps.

As amended by the Dodd-Frank Act, CEA Section 2(h)(1) provides that it shall be unlawful for any person to engage in a swap unless that person submits such swap for clearing to a derivatives clearing organization if the swap is required to be cleared. However, Section 2(h)(7) of the CEA, as added by the DFA, also provides that a swap otherwise subject to mandatory clearing is subject to an elective exception from clearing if one party to the swap is not a financial entity, is using swaps to hedge or mitigate commercial risk, and notifies the Commission, in a manner set forth by the Commission, how it generally meets its financial obligations associated with entering into non-cleared swaps.

The Commission proposes Rule 39.6 to specify requirements for electing to use the exception to mandatory clearing of swaps established by CEA Section 2(h)(7). Proposed Rule 39.6 specifies requirements for using the elective end-user exception to the mandatory clearing of swaps established by CEA Section 2(h)(7).

The rules proposal calls for a user-friendly, check-the-box approach to the Dodd-Frank Act’s notification requirement. The Commission expects that 12 drop-down boxes will be used.

Proposed Rule 39.6 would simply require an indication of each of any of five methods used to mitigate the credit risk associated with non-cleared swaps. Additional boxes would indicate whether finance affiliate or a SEC Filer is involved. The reporting counterparty would further be required to check a box in order to indicate whether the swap was being used to hedge or mitigate commercial risk, as defined by proposed Rule 39.6(c). These data elements would be provided as part of the overall package of swap-related information that must generally be submitted by reporting counterparties to SDRs under the Dodd-Frank Act.

To qualify for the end-user clearing exception with respect to a particular swap transaction, CEA Section 2(h)(7)(A)(ii) requires that a non-financial entity must be using the

¹ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

² 7 U.S.C. 1 *et seq.*

swap to hedge or mitigate commercial risk. The Commission's Proposed Rule 39.6(c) deems that the use of a swap is for hedging purposes in three circumstances. This proposed rule does not require any recordkeeping or reporting. It simply defines what hedging or risk mitigation for purposes of qualifying for the notification provision in Proposed Rule 39.6.

2. Indicate how, by whom, and for what purpose the data would be used. Except for a new collection, indicate the actual use the agency has made of the information received from the current collection.

The data would be used by the Commission to assess and monitor the use of the end-user exception to clearing as mandated by Congress in CEA Sections 2(h)(7) and 21 of the CEA, as amended by the DFA. This information also will be available and used for regulatory purposes by other governmental agencies including the: Board of Governors of the Federal Reserve System, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Farm Credit Administration and Federal Housing Finance Agency, Financial Stability Oversight Council, Securities and Exchange Commission, Department of Justice, and any other person the Commission determines to be appropriate, including foreign financial supervisors, foreign central banks, and foreign ministries.

3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g. permitting electronic submission of responses, and the basis for the decision for adopting this means of collection. Also describe any consideration of using information technology to reduce burden.

All the information collection requirements involve the use of certain electronic collection protocols, such as email and the internet. All required submissions may be submitted electronically.

4. Describe efforts to identify duplication. Show specifically why any similar information already available cannot be used or modified for use for the purposes described in Item 2 above.

These Regulations are the first effort by the Commission to prescribe provisions for notifications regarding end user use of swaps for hedging or risk mitigation purposes. Prior to the adoption of the Dodd-Frank Act, the Commission did not have the authority to require the regulation of over-the-counter swaps, particularly after the enactment of the Commodity Futures Modernization of 2000, which has been repealed in substantial part by the Dodd-Frank Act. There are no existing regulations that could be modified to serve a similar purpose.

5. If the collection of information involves small business or other small entities (Item 5 of OMB Form 83-I), describe the methods used to minimize burden.

The Commission has established certain definitions of “small entities” to be used by the Commission in evaluating the impact of its regulations on such entities in accordance with the RFA. Because of regulatory restrictions on the persons who can enter into the swaps that would be subject to the notification requirement, all of the persons subject to the requirement would be Eligible Contract Participants (“ECPs”), as defined in the CEA. ECPs have previously been determined by the Commission not be “small entities” for RFA purposes. SDRs are a new category of registrant. In the Federal Register release proposing the regulations containing the collection of information requirements, the Commission did not define registered SDRs or ECPs as small entities and the Commission certified SDRs and ECPs as not “small entities.”

6. Describe the consequence to the Federal Program or policy activities if the collection were conducted less frequently as well as any technical or legal obstacles to reducing burden.

Without having the end user data reporting under the proposed Rule 39.6, the Commission would not be able to adequately assess and monitor end user trading activities as Congress directed. This is a one-time reporting requirement. Less frequency would be impossible without wholly abandoning Congress’s mandate for the Commission to assess and monitor end-users’ execution of non-cleared swaps under Sections 2(h)(7), 2(j), and 21 of the CEA.

7. Explain any special circumstances that require the collection to be conducted in a manner:

- requiring respondents to report information to the agency more often than quarterly;

See response to Question 6. This will be a one-time reporting requirement each time a new swap is executed.

- requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;

n/a

- requiring respondents to submit more than an original and two copies of any document;

Respondents are not required to submit more than an original and two copies of any document.

- requiring respondents to retain records other than health, medical, government contract, grant-in-aid, or tax records, for more than three years;

The proposed rules do not impose recordkeeping requirements.

- in connection with a statistical survey that is not designed to produce valid and reliable results that can be generalized to the universe of study;

The proposed regulations do not involve statistical surveys.

- requiring the use of a statistical data classification that has not been reviewed and approved by OMB;

The proposed regulations do not involve the use of statistical data.

- that includes a pledge of confidentiality that is not supported by authority established in statute or regulation, that is not supported by disclosure and data security policies that are consistent with the pledge, or which unnecessarily impedes sharing of data with other agencies for compatible confidential use; or

All confidentiality pledges are supported by authority established in the Dodd-Frank Act, the CEA, or these proposed regulations.

- requiring respondents to submit proprietary trade secrets, or other confidential information unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law.

Section 8(a) of the CEA provides that, “unless specifically authorized in this Act, the Commission may not publish data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.” A number of narrow exceptions are set forth in Sections 8(b) and (e) of the CEA permitting the Commission to disclose “Section 8 material” for (i) prior public disclosures, (ii) congressional, administrative and/or judicial proceedings, (iii) other federal departments and agencies, individual states and foreign futures authorities, and (iv) registered entity investigations.

In addition, Section 21(c) (6) of the CEA, as amended by the Dodd-Frank Act, provides that a registered SDR must “maintain the privacy of all swap transaction information that the swap data repository receives from a swap dealer, counterparty, or any other registered entity.”

Information submitted under Proposed Rule 39.6 will be protected by these provisions in the CEA to the maximum extent allowed.

8. If applicable, provide a copy and identify the date and page number of publication in the Federal Register of the agency's notice required by 5 C.F.R. 1320.8(d), soliciting comments on the information collection prior to submission to OMB. Summarize public comments received in response to that notice and describe actions taken by the agency in response to these comments. Specifically address comments received on cost and hour burden.

A copy of the proposed rules has been submitted to the Federal Register for publication and public comment. They have not yet been published.

Describe efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping disclosure, or reporting format (if any, and on the data elements to be recorded, disclosed, or reported.

CFTC and SEC staff has conducted many external meetings with end users and groups representing end-user interests since the Dodd-Frank Act was signed into law. The Commission has published a list of all external meeting held on Dodd-Frank Act implementation on its website. The proposed rules will be published in the Federal Register seeking public comment and the Commission will seek public comment on the collections of information associated with its rules proposal.

Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every three years—even if the collection of information activity is the same as in prior periods. There may be circumstances that may preclude consultation in a specific situation. These circumstances should be explained.

As part of the rulemaking process with respect to end users, the Commission has conducted external meetings with end users and representatives of end-user related groups. A list of the external meetings conducted can be found on www.cftc.gov. The Commission expects these efforts to continue as the end user rules are implemented throughout 2011.

9. Explain any decision to provide any payment or gift to respondents, other than remuneration of contractors or grantees.

This question does not apply.

10. Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulations, or agency policy.

See the response to Question 7. Section 8(a) of the CEA generally prohibits the Commission from separately disclosing the “business transactions or market positions of any person and trade secrets or names of customers.” The Commission also has adopted Freedom of Information Act regulations, 17 C.F.R. Part 145 which implements the federal statute set forth in 5 U.S.C. §552, including exemptions to disclosure which permit a federal agency to withhold information prohibited from disclosure by another statute. See 5 U.S.C. § 552(b)(3) and Commission Regulation 145.5(c), 17 C.F.R. § 145(c).

11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency considers the questions necessary, the specific uses to be made of the information, the explanation to be given to persons from whom the information is requested, and any steps to be taken to obtain their consent.

The regulations covered by the collections do not require the giving of sensitive information, as that term is used in Question 11.

12. Provide estimates of the hour burden of the collection of information. The Statement should:

- Indicate the number of respondents, frequency of response, annual hour burden and an explanation of how the burden was estimated. Unless directed to do so, agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than ten) of potential respondents is desirable. If the hour burden on respondents is expected to vary widely because of differences in activity, size or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally, estimates should not include burden hours for customary and usual business practices.

The Commission estimates that there are approximately 1,000 end users who must report one time in a given year. In making this estimate, the Commission estimated that there are approximately 30,000 end users who are counterparties to a swap in a given year. Of these end users, the Commission estimates that the majority will not be required to report because their counterparty is a swap dealer or major swap participant. In that case, the swap dealer or major swap participant is required to make the report on behalf of the end user. The notification will occur only once at the execution of the swap. Therefore, end users who are counterparties to a swap entered into in a previous year will presumably have already made the notification and will not be required to make further notifications under the rule in subsequent years. Reducing the number of annual end users by these factors, the Commission estimates that there are approximately 1,000 end users who must report in a given year. The Commission estimates that the report will require between approximately 10 minutes and one hour of burden, per end user per year. The number of burden hours per end user may vary depending on various factors, such as the number of swaps entered into by that end user in the given year. Therefore, the number of estimated aggregate annual burden hours is between approximately 167 and 1,000 hours.

- If the request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour burdens in Item 13 of OMB Form 83-I.

This question does not apply; there is not more than one form covered by this request.

- Provide estimates of annualized cost to respondents for the hours burdens for collections of information, identifying and using appropriate wage rate categories. The cost of contracting out or paying outside parties for information collection activities should not be included here. Instead, this cost should be included in Item 13.

The Commission estimates that the annualized cost to a respondent is between approximately \$12.13 and \$72.75, reflecting its estimate that the report will require between approximately 10 minutes and one hour of burden, per end user per year. The Commission based its calculations on an hourly wage rate³ of \$72.75 to comply with the proposed regulations. The Commission estimates that the aggregate annualized cost is between approximately \$12,130 and \$72,750, reflecting the estimated aggregate annual burden hours of between approximately 167 and 1,000 hours.

13. Provide an estimate of the total annual cost burden to respondents or recordkeepers resulting from the collection of information. (Do not include the cost of any hour burden shown in Items 12 and 14).

- The cost estimate should be split into two components; (a) a total capital and start-up cost component (annualized over its expected useful life) and (b) a total operation and maintenance and purchase of services component. The estimates should take into account costs associated with generating, maintaining, and disclosing or providing the information. Include descriptions of methods used to estimate major costs factors including system and technology acquisition, expected useful life of capital equipment, the discount rate(s), and the time period over which costs will be incurred. Capital and start-up costs include, among other items, preparations for collecting information such as purchasing computers and software, monitoring, sampling, drilling and testing equipment, and record storage facilities.
- If cost estimates are expected to vary widely, agencies should present ranges of cost burdens and explain the reasons for the variance. The cost of purchasing or contracting out information collection services should be a part of this cost burden estimate, agencies may consult with a sample of respondents (fewer than ten), utilize the 60-day pre-OMB submission public comment process and use existing economic or regulatory impact analysis associated with the rulemaking containing the information collection, as appropriate.
- Generally, estimates should not include purchases of equipment or services, or portions thereof, made: (1) prior to October 1, 1995, (2) to achieve regulatory compliance with requirements not associated with the information collection, (3) for reasons other than to provide information or keep records for the government, or (4) as part of customary and usual business or private practices.

The Commission believes that the additional technological infrastructure required to satisfy an end user's notification responsibility will be minimal. Proposed Rule 39.6 would require non-financial entities to notify the Commission each time the end-user

³ In arriving at a wage rate for the hourly costs imposed, Commission staff used the Management & Professional Earnings in the Securities Industry Report, published in 2010 by the Securities Industry and Financial Markets Associations (2010 Report). The wage rate used is a composite (blended) wage rate by averaging the mean annual salaries of an Assistant/Associate General Counsel, an Assistant Compliance Director, and a Programmer (Senior) as published in the 2010 report and dividing that figure by 2000 annual working hours to arrive at the hourly rate of \$72.75.

clearing exception is elected by delivering specified information to a registered SDR or, if no registered SDR is available, the Commission in the manner required by the proposed Part 49 rules for swaps data recordkeeping and reporting. The notification will occur only once at the execution of the swap, and is expected to be made by a relatively simple means, such as by accessing a web site and providing basic information related to the swap.

If one of the counterparties to the swap transaction is a swap dealer or a major swap participant, notification would be provided through that counterparty. The non-financial counterparty would provide notice only in the event its counterparty is not a swap dealer or a major swap participant. The equipment and services that the end user would be required to use to provide the notification are expected to be available to the end user in the course of executing the swap; no additional equipment or services are expected to be necessary to provide the notification.

14. Provide estimates of the annualized costs to the Federal Government. Also provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing and support staff), and any other expense that would not have been incurred without this collection of information. Agencies may also aggregate cost estimates from Items 12, 13, and 14 in a single table.

No increased costs to the government are anticipated as a result of this new collection of information above those estimated costs outlined in the OMB Supporting Statement submitted in connection with the “Swap Data Repositories” Notice of Proposed Rulemaking, approved by the Commission on November 19, 2010, to be published in the Federal Register on December 23, 2010.

15. Explain the reasons for any program changes or adjustments reported in Items 13 or 14 of the OMB Form 83-I.

These are new collections and the question, therefore, does not apply.

16. For collection of information whose results are planned to be published for statistical use, outline plans for tabulation, statistical analysis, and publication. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.

This question does not apply.

17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.

This question does not apply.

18. Explain each exception to the certification statement identified in Item 19, "Certification for Paperwork Reduction Act Submissions," of OMB Form 83-I.

No exceptions exist.